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Presiding Justice, Appellate Term
NYS Supreme Court, Retired
(1924-2015)

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June 9, 2022

VIA ECF

The Honorable Philip M. Halpern, U.S.D.J.
U.S. District Court for the Southern District of New York
300 Quarropas Street, Room 530
White Plains, New York 10007-1312

**Re: *Beatrice Cushner v. Thomas W. Jacobs (“Defendant Jacobs”) and
Jacobs Communications Group LLC d/b/a BNC Voice (“Defendant BNC”)*
Southern District of New York - Case No.: 7:22-cv-00412**

Your Honor:

This firm is counsel to Plaintiff Beatrice Cushner (“Plaintiff”) in the above referenced matter. We are writing with the consent from Defendants’ counsel, Louis Lombardi, to advise you that the parties have met and conferred pursuant to your directions during the June 2, 2022 court conference. The parties have agreed to mediate before the Magistrate Judge prior to commencing discovery. Unfortunately, the parties do not agree regarding Defendants’ use of the Escrow Funds for legal fees.

The crux of Plaintiff’s complaint is that Defendant Jacobs has utilized the Escrow Funds for Defendants’ own purposes in violation of the terms of the Asset Purchase Agreement and Redemption Agreement. It is Defendants’ contention that Defendants are entitled to pay Defendants’ legal fees from the Escrow Funds because as a business expense incurred in the winding up of Defendant BNC.

As set forth in Plaintiff’s Complaint, simultaneously with the execution of the Asset Purchase Agreement, Defendants and Plaintiff entered into a Redemption Agreement (the “Redemption Agreement”) under which Plaintiff’s membership interest was redeemed. At the closing of the sale the sum of \$276,836.00 was placed in escrow for the second payment installment of the Purchase Price (the “Escrow Funds”), pursuant to an Escrow Agreement between the purchaser, FluentStream Technologies, LLC and Defendant BNC. Plaintiff is no longer a member of the LLC and has no control over either the assets of Defendant BNC nor the Escrow Funds.



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Pursuant to the Redemption Agreement, the Escrow Funds should have been released in July, 2020 to Plaintiff and Defendant Jacobs *pari passu*. In accordance with the terms of Paragraph 6(b)(ii) of the Redemption Agreement, Plaintiff was entitled to the sum of \$176,836.00 and Defendant Jacobs was entitled to the maximum amount of \$100,000.00. However, Defendant Jacobs withdrew his \$100,000.00 “off the top” of the Escrow Funds, while not making any distribution to the Plaintiff.

Instead, Defendant Jacobs has retained Plaintiff’s portion in escrow while using Plaintiff’s share of the Escrow Funds to pay Defendants’ legal fees. However, there is nothing in the Redemption Agreement which allows Defendant Jacobs to take any expense out of Escrow Fund. And, Defendants have not pointed to a provision or document expressly creating a right of reimbursement for legal fees from the Escrow Funds, which contains money belonging to Plaintiff.

From Defendants’ perspective, the Escrow Funds cannot be paid out until all business related expenses have been settled; and the defense of the Defendant BNC and its members is an appropriate corporate expenditure. To hold otherwise, would lay the Defendants bare in any and all legal actions taken against them. Additionally, Defendants do not believe that a fair reading of the Redemption Agreement prohibits this type of expenditure. As stated above, Defendants are willing to mediate the issues in this case to see if the matter can be resolved without the need for extensive expenditures by both sides.

We thank your honor for your time and courtesies.

Respectfully submitted,

LEVITT LLP

By: 
Karen L. Weiss

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